Law Enforcement Officials and Students with Disabilities

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Background

The 1997 Amendments to the Individuals with Disabilities Education Act (IDEA) included provisions that expressly stated that school officials are not prohibited from reporting crimes committed by students with disabilities, and law enforcement and judicial officials are not prevented by the IDEA from exercising their independent authority under criminal law. Nothing in the statute or regulations reduced public school officials' duties and responsibilities to carry out the substantive or procedural terms of the IDEA regarding students identified as needing special education when law enforcement authorities become involved. Nothing in the statute or regulation expanded, or reduced, law enforcement or judicial officials' authority over students with disabilities who may be engaged in criminal conduct. The statute and regulations require, in limited situations, the transfer of a student's disciplinary and special education records to law enforcement authorities when the school reports a crime.

Introduction

Prior to the 1997 Amendments to the IDEA, a number of lower courts had wrestled with several issues related to the involvement of law enforcement officials and students identified as needing special education. Until then, there was no express guidance for the courts in the language of the IDEA, either in the statute or in the regulations, and the courts were forced to struggle with answers to the statutorily unanticipated issues before them. All things considered, those early court decisions did a remarkable job of applying the law and anticipating what the law would become.

When Congress enacted the 1997 Amendments into law, the IDEA, for the first time, expressly provided guidance for schools and law enforcement officers in the handling of student behavior that had criminal implications. The subsequently promulgated regulations largely followed the statute, but added important clarification language.

Before discussing these important issues in more detail, readers should have the specific language of the statute and regulations in mind. Some issues discussed will fall neatly within the expressed language provided, and some will not.

20 U.S.C. § 1415 (k)(9) Referral to and action by law enforcement and judicial authorities.

(A) Nothing in this subchapter shall be construed to prohibit an agency [school] from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) An agency [school] reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

Nothing in the House or Senate reports on the 1997 Amendments shed any insight into interpretation of the quoted statutory language.

The subsequent adoption of regulations, found at 34 C.F.R. § 300.529, uses language almost identical to the statute for subrules (a) and (b)(1). As will be discussed later, however, subrule (b)(2) was new language used to

clarify a potential conflict between the statutory IDEA mandate to transmit the "special education and disciplinary records of the child" to law enforcement officials and another federal statute, the Family Educational Rights and Privacy Act (20 USC § 1232 g; 34 CFR, Part 99). The subrule (b)2 requires the transmittal of special education and discipline records to law enforcement authorities only to the extent permitted by FERPA.

The United States Department of Education comments regarding suggestions made by the public to the initial drafting of "proposed" rules, and changes in the final rules made by it as a result, appear in "*Analysis of Comments and Changes,*" (1999). Those comments affirm that the purpose of the newly adopted statutory addition and rule was to clarify respective school and law enforcement authority regarding crimes committed by students with disabilities. The comments clearly remind educators that the new rule "does not authorize school districts to circumvent any of their responsibilities under the Act" (p.12631). **The new language of the IDEA was intended to bring closure to questions regarding the findings of most early court rulings, that school authorities could report crimes committed by children with disabilities, and law enforcement and judicial authorities could exercise their own authority without conflict with the IDEA. School officials have their job to do and law enforcement and judicial authorities have their job to do. So long as the authority is not abused to the detriment of children with disabilities in a discriminatory manner, in violation of the Rehabilitation Act of 1973 (Section 504), actions by such officials do not violate the IDEA.** The "*Analysis of Comments and Changes*" stated clearly that the new IDEA "does not address whether school officials may press charges against a child with a disability when they have reported a crime by that student" (p. 12631). This omission needs to be explored very carefully when the question of the intent of school official actions can be challenged.

It can be easily argued that when school officials report a crime committed by a student with disabilities, file a criminal complaint against the student, and then do not follow required IDEA procedures they would normally follow in student discipline situations (such as manifestation determination, functional behavioral analysis, determination of appropriateness of alternative education setting), their real intent was to circumvent the IDEA procedures. Two courts in Tennessee have found that schools violated IDEA procedural protections when they filed complaints in juvenile court instead of following the required procedures related to long-term suspension from school (In re *McCann*, 1990; *Morgan v. Chris L.*, 1994). In Wisconsin, a court absolved school officials from wrongdoing in allegedly turning to the juvenile court rather than complying with IDEA procedures. The court noted that school officials in Wisconsin do not have independent legal authority to initiate juvenile court proceedings. In that state, only the county attorney may do so (In re *Trent N.*, 1997, p. 725). The Wisconsin ruling is, therefore, not contrary to the two Tennessee decisions where school officials had the authority to initiate juvenile court proceedings and did so in order to circumvent their procedural duties under the IDEA. In discussing the issue, Huefner (1998, p.1111) advised school districts, in those states which allow schools to file criminal complaints, to merely "report" crimes and allow law enforcement authorities to file the criminal complaint. Zirkel (1999) has reminded educators that unless staff or student victims of criminal conduct are limited by school policy, they may file criminal charges against a student with disabilities because they are not prohibited from doing so by the IDEA.

Commonly Asked Questions

Question #1: *May school officials avoid or ignore their IDEA procedural and educational responsibilities by instead "reporting a crime committed by a child with a disability" to law enforcement authorities?*

NO. The United States Department of Education comments accompanying the final regulations appearing in the *Federal Register* ("*Analysis of Comments and Changes*," 1999, p. 12631) make it clear that the reporting of a crime under § 300.529 (a) "does not authorize school districts to circumvent any of their responsibilities under the Act." Neither does the IDEA, itself, or the regulations promulgated, address whether school officials may pursue criminal charges against a student when they have reported a crime committed by that student. The reporting of crimes involving students with disabilities in a manner which differ from that for reporting students without disabilities could be considered discrimination under Section 504 of the Rehabilitation Act of 1973.

Discussion. The IDEA currently requires that a number of educational and legal safeguards be present in varying student disciplinary situations. Depending on the student's situation, and the planned disciplinary action by school officials for the student's violation of school rules that are related to the alleged criminal activity reported, school officials must assure themselves that appropriate IDEA processes and procedures have been, or will be, implemented. Included in that list for consideration would be:

- the prerequisites for placement in an appropriate alternative educational setting,
- a manifestation determination,
- a functional behavioral assessment plan,
- a behavioral intervention plan or review,
- determination of the appropriateness of the student's individualized education program (IEP) and educational placement,
- provision of parent procedural safeguards, including a notice of proposed change of placement which may trigger a due process hearing, which in turn triggers the "stay-put" provision,
- and the provision of constitutional procedural due process to which the student may also be entitled.

With such a daunting prospect, it is natural that a few school officials have thought that having a student arrested would be an option that could free them from all or some of their legal duties under the IDEA. That was never an accurate assumption under previous interpretations of the IDEA. It was made clear by the U.S. Department of Education that it will **not now** allow such an interpretation ("*Analysis of Comments and Changes*," 1999, p.12631).

School officials faced with a disciplinary situation involving a student with disabilities must in good faith carry out IDEA mandated substantive and procedural requirements whether or not a student has been arrested. Failure to carry out duties required under the IDEA following an arrest of a student in which the school participated (certainly in those situations where the school sought criminal charges) could be argued to be evidence of improper motive on the part of school officials. The U.S. Department of Education in its discussion of the new rules stated, "The Act does not address whether school officials may press charges against a child with a disability when they have reported a crime by that student" (Id.).

Pre-1997 Interpretations

The Tennessee Court of Appeals in *In re: Tony McCann* (1990), found that a school district had circumvented the procedural requirements of both state and federal special education laws by filing a petition in juvenile court rather than following the procedures required by special education law. The school was found to have improperly failed to conduct a manifestation determination, improperly suspended the boy's education for a time period in excess of 10 days, deprived the student of a free appropriate public education (FAPE), and failed to provide the parents an appropriate notice of its action which resulted in a "change of placement."

The *McCann* decision was later cited with approval by a federal district court in Tennessee in *Morgan v. Chris L.*(1994). In *Chris L.*, the court concluded that the school violated the IDEA by filing a petition in juvenile court against a student rather than providing him procedural and substantive protections which must accompany a proposed change in educational placement. The court upheld an administrative law judge's order that the school seek termination of the juvenile court proceeding.

Post-1997 Interpretations

A state trial court in Connecticut has ruled that its jurisdiction and action in a delinquency proceeding were not pre-empted by the IDEA. It found that neither the school's responsibility under the IDEA was altered by juvenile court involvement with the student, nor was its own authority diminished by the IDEA. The court noted, in response to a student legal argument that the school's action in reporting the crime was for the purpose of circumventing its responsibilities under the IDEA, that the student had a separate remedy through the IDEA due process procedures. It responded that the juvenile court action was the state's remedy when a juvenile engaged in delinquent activity. (*State v. David F.*, 1998.)

Question #2: *May school officials request the assistance of law enforcement officials or report a crime to law enforcement officials without violating the procedural requirements of the IDEA?*

YES. School officials may request the assistance of law enforcement officials at any time for the purposes of maintenance of order, traffic control, crowd control or when a similar need for assistance arises. In one special education ruling, the administrative law judge (ALJ) noted that because of their broad range of duties carried out in society, the phrase "peace officers" is often used in reference to law enforcement officers (In re *Maurice M. II*, 2002).

Discussion. There is a considerable distinction between school situations where school officials merely request law enforcement officials' assistance, such as may be necessary to maintain order or inform law enforcement officials of a possible violation of the law, and those situations where the school attempts to circumvent its legal responsibility under the IDEA by having a student arrested and charged with a crime. As the administrative law judge (ALJ) in In re *Maurice M. II* (2002) pointed out, the IDEA amendment on the issue of reporting crimes has not changed the traditional independent roles of school officials and law enforcement officials, as they

continue to perform their respective functions independent of one another. A problem arises only when school officials attempt to substitute law enforcement action for their own responsibilities to a student under the IDEA by reporting a crime or seeking an arrest and a criminal conviction. In these situations, the actual intent of school officials can be inferred from their actions or omissions in a particular situation. (In re *Maurice M. II* (2002), p. 226-227).

Pre-1997 Interpretations

A few years after the IDEA was first implemented, a Michigan student argued successfully that the IDEA's authority for special education placement prevailed giving the state court authority to take jurisdiction of delinquent children. The court ruling stated that a school could petition the juvenile court for action only after the school had exhausted its programming options for students with disabilities (*Flint Board v. Williams*, 1979).

In response to a student with disabilities' argument that a court order of confinement in jail would violate the student's educational placement rights under the IDEA, the judge noted that his responsibility was to the community interest and not in the student's individual interest in receiving a FAPE. In re *Christopher V.T*. (1994).

A federal court in Minnesota ruled that there was no conflict with a student's rights under the IDEA and action taken by a juvenile court merely because action taken by a juvenile court might indirectly impact a student's education under the IDEA. In the absence of school official initiation of the juvenile court action or participation in the action, there was no conflict with the student's rights under the IDEA. The court, by analogy, noted that while a trial for a student with disabilities on the charge of murder would certainly have an impact the student's education, the resulting situation of court involvement would not impact the provision of programs and services under the IDEA. *A.A. v. Independent School District Number 283* (1996).

The Office of Civil Rights, under its enforcement responsibilities for Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans With Disabilities Act of 1990 has ruled that schools do not illegally discriminate on the basis of disability by referring disorderly students to law enforcement officials who arrest and prosecute the student. This is especially true when educational services are continued and IDEA procedures are followed by the school after the arrest. See *Citrus County (FL) School Distric*t, 2000; and *Battle Creek (MI) Public Schools*, 1990.

Post-1997 Interpretations

A Wisconsin appellate court ruled that the procedural requirements of the IDEA, particularly the "stay-put" provision on changes of placement, do not prevent juvenile court authorities from independently acting in the scope of their authority. In re *Trent N* (1997).

An Arkansas hearing officer ruled that the proper roles of school and law enforcement officials were improperly interchanged when school officials, motivated by a desire to circumvent the IDEA procedures, manipulated a situation in such a way that a school police resource officer arrested the student. *Cabot School District* (1998).

A Florida district court of appeals ruled that an administrative code governing IDEA procedures applied to school districts' internal disciplinary procedures only, and did not preempt juvenile court delinquency proceedings. *State v. T.O*. (1998).

A similar result occurred in Connecticut. The court ruled that delinquency proceedings in

juvenile court are not pre-empted by the IDEA. It noted that a student's substantive rights under the IDEA are not ended when a student entered the juvenile justice system, and a student continues to have a due process procedure remedy under the IDEA when the school is attempting an "end run" of its own procedural responsibilities under the IDEA. The court went on to note that the state has its own separate remedy independent of the IDEA through the juvenile court when a student engages in delinquent activity. *State v. David F.* (1998).

A New York court ruled that the filing of a juvenile court petition by school officials did not violate the IDEA when the school's purpose was not to effect a change in the student's placement. Instead, the school was seeking juvenile court support for continuation of the student's individualized education program. In re *Beau II* (2000).

A Pennsylvania court ruled that school officials reporting a crime of arson to law enforcement officials did not violate the procedural safeguards of the IDEA. After an investigation, law enforcement officials filed a juvenile court petition regarding the student, as a result of which the student was incarcerated. The court found that the school was not required to conduct a manifestation determination review before notifying law enforcement authorities. *Joseph M. v. South Delco School District* (2001).

A Massachusetts student argued that a juvenile court proceeding involving drugs at school constituted a change in educational placement and services under the IDEA. The court disagreed and ruled against the student's argument. In doing so, the court noted that the trial judge had found no evidence to establish that school authorities intended to telephone the police as a means of avoiding their responsibilities under the IDEA. But the court did imply that a school attempting to do so would not be allowed such an "end run." *Commonwealth v. Nathaniel N.* (2001).

Question #3: ***When a student is reported for a crime and arrested by law enforcement officials and charged with a crime, either occurring at school or away from school, should the school continue to carry out its IDEA mandated duties?***

YES. When students are arrested, tried and even temporarily incarcerated, the state's duties to the student under the IDEA are not abrogated, and the school must provide FAPE and various statutory and constitutional rights to students if and when they return to school. The school's reporting of a crime in no way alters school responsibility under the IDEA so long as the student remains in the school district, or may subsequently return to the school district. The state has a duty to see that FAPE is provided to incarcerated students with disabilities.

Discussion. While school authorities may report crimes related to students with disabilities to law enforcement officials, law enforcement officials will act under the purview of their own legal authority and discretion, independent of school officials. School officials do not control the whether, when and under what conditions an arrested student will return to school. Regardless of what juvenile authorities do with the disposition of an arrested student, educators must always prepare for the potential and, usually likely,

return of the student to school. Juvenile authorities often exercise their discretionary authority without informing school officials of their intentions or actions, and it behooves school officials to presume that a student arrested for alleged criminal misconduct, whether the crime was reported by the school or not, will be back in school soon, perhaps the next day. The IEP team, including the student's parents, should review the IEP and placement for appropriateness, and consider additional evaluation for the student. When school officials expect to take school disciplinary action related to the arrested student's misconduct, plans should be in operation to explore the appropriateness of potential alternative educational settings, conduct a manifestation determination, conduct a functional behavioral analysis, develop or review a behavior improvement plan, and consider other important process and procedural items, such as provision of parental procedural safeguards.

Question #4: ***When school officials report a crime that may involve a student with disabilities, must they be sure that the juvenile authorities receive copies of the student's education records?***

YES, but not in all circumstances. Both the federal statute [20 U.S.C. § 1415(k)(9)] and regulations appearing at 34 C.F.R. § 300.529 (b)(1) state that a school "reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime."

Unfortunately, the situation involving transfer of records is more complex than it first appears. When Congress enacted the provision of the IDEA requiring transmittal of records to law enforcement officials, it created a potential conflict with another federal statute, the Family Educational Rights and Privacy Act (FERPA). When the Department of Education promulgated its rules under the IDEA in 1999, it attempted in subrule 300.529 (b)(2), to clarify the situation by requiring the transfer of the student's education records "only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act." In its explanation, the Department noted that to do otherwise "arguably would violate the equal protection rights of children with disabilities" because children without disabilities would continue to be protected against this involuntary disclosure ("*Analysis of Comments and Changes*," 1999, p.12631). The Department's regulations under FERPA would permit the disclosure of special education and disciplinary records in only limited situations: (a) with the prior informed written consent of the parent or a student aged 18 or older; (b) compliance with a lawfully issued subpoena or a court order, and only when the school makes a reasonable attempt to notify the parent of the court order or subpoena in advance of compliance; (c) when the disclosure is made in connection with a bona fide emergency and the information is necessary to protect the health or safety of the student or others; and (d) when disclosure is made pursuant to a state statute concerning the **juvenile justice system** and the system's ability to effectively serve the student's needs **prior to adjudication**. In the situation present in the last confidentiality exception involving release of records to the **juvenile justice system**, state law must have created an information system consisting of only state and local officials and one which protects against redisclosure of a juvenile's education records (Family Educational Rights and Privacy Act,

34 C.F.R. § 99.38). Iowa has such a statutory provision, but it must be implemented through a written agreement (§ 280.25 Iowa Code).

One additional note on this already confusing issue applies to only school districts which maintain their own "law enforcement unit." That is a unit authorized to enforce local, state or federal criminal laws or to maintain the physical security and safety of the school district. The records of a school district law enforcement unit are not education records under the FERPA so long as the records are created by and for the unit, and are maintained by the unit. Any records of an educational nature, and not for law enforcement purposes, such as a noncriminal disciplinary action by the school district, maintain their status as education records and cannot be released except as stated in the preceding paragraph. Law enforcement unit records kept for "law enforcement purposes," only, are not subject to FERPA's disclosure requirements and may be disclosed as the unit deems appropriate (Family Educational Rights and Privacy Act, 34 C.F.R. § 99.38).

Legal questions regarding the interrelationship between the IDEA and FERPA and the transfer of special education and discipline records regarding a student with disabilities reported by school authorities can obviously arise in many contexts. Commentators Mayes and Zirkel (2000) have identified the technical legal issues surrounding the difference between the IDEA statutory provision and the United States Department of Education regulations regarding the transfer of education records to law enforcement. They concluded, under several different legal analyses, that the regulatory requirement that schools transfer education records to law enforcement officials only within the context of FERPA is legally appropriate (p. 479).

Discussion. Effectively, the IDEA now requires the sharing of education records with regard to students with disabilities "who are accused by schools of crimes" (*Analysis of Comments and Changes*, 1999, p.12632). However, there are a number of complexities inherent in this issue. First and foremost is the question of what act by school officials constitutes "reporting a crime committed by a child with a disability" and triggers a school's responsibility to transmit educational records. Don't forget, the double edged sword: a legal responsibility to transmit records in a situation of "reporting a crime" implies that the authority to transfer records to law enforcement authorities is absent **when** the school is **not actually reporting a crime**. When a school believes that a student with disabilities has committed a crime and reports the suspected crime to law enforcement officials, the school must transmit the student's relevant education records, but only when the state has a statute meeting the requirements of FERPA, or one of the other FERPA exceptions to parent consent is present. Under Iowa law, a written agreement must exist which provides for the proper implementation of the transmission of education records to law enforcement officials.

But, what about transmittal of student records when the school summons police to investigate a crime at school committed by persons unknown, or the school requests police to be at the school for crowd control or supervision of an event, and the police decide on their own authority to arrest a student with disabilities? A state level review hearing officer in New York had before him a situation where a student's conduct resulted in school officials contacting police because they suspected that the student's actions were criminal, but the school officials were not knowledgeable enough about criminal law to make that determination independently. The hearing officer found that school officials should not be expected to be experts in criminal law and rejected the parent's argument that school officials must have substantial evidence of the commission of a crime before reporting the incident to police. Transfer of the student's records to police was upheld (*Board of Educa-*

tion, 1999). A South Dakota state level hearing officer found the actions of school officials to be proper, including the transfer of student educational records, when they reported a student's threats of violence to law enforcement officers for their "review," and without any request from school officials, the student was arrested (*Winner School District*, 2001). The South Dakota hearing officer upheld the transfer of the student's records to the juvenile court under the FERPA confidentiality exception as being necessary to protect the health and safety of others.

An Iowa administrative law judge (ALJ) has taken a slightly more restrictive view than his counterparts in New York and South Dakota regarding the duty to transfer student records when law enforcement officers were called to a school to maintain order, and decided independently to arrest the student for "disorderly conduct." The ALJ concluded on the facts that school officials did not seek to "report a crime" or have the student arrested and, therefore, did not have a legal duty under the IDEA to transfer the student's education records to juvenile authorities. (*Des Moines Independent Community School District,* 2001). The records were transferred to juvenile court pursuant to a court subpoena about five weeks following the arrest.

On subsequent rehearing in the Iowa decision, the parent argued that school officials do not have to request an arrest in order for the transfer of records to be mandated under the IDEA. She argued that virtually any contact with law enforcement officials constituted the "reporting of a crime" under the IDEA. This argument was rejected by the ALJ, who concluded that before an incident can be considered reportable as a crime under the IDEA, and requiring the transfer of student records, the "school officials must believe that events in the situation are a crime or that they may constitute a crime." To follow the interpretation argued by the mother "would require schools to turn over education records to police in numerous inappropriate situations" (In re *Maurice II,* 2002, p. 6). The ALJ concluded that in order for the IDEA requirement to transfer student records to law enforcement officials to be triggered:

> School officials must manifest an intent to report a crime…. School officials must have wanted police to make an arrest, or conduct an investigation which could lead to an arrest for a crime,… There must be present in the actions by school officials a manifested intent and understanding that their communications to law enforcement officials should or could likely result in the arrest of a student with a disability for a crime. [*Id*. at pp. 7 & 8.]

Unless an objective standard is used, many common interactions between school officials and law enforcement officials (i.e., police resource officers) could potentially result in a mandate to transfer a student's education record, but no one would recognize it at the time. Or, in the alternative, schools could transfer records every time they mentioned a student's name to police. But, that would result in improper transfer of the records of some students. The plain meaning of "reporting a crime" must include a knowing intent on the part of school officials to take action which is likely to involve the arrest of the student. When school officials "intend" to report a crime, they then will know that they should transfer student records. Otherwise, school officials merely providing information without the necessary manifested intent would place educators in the untenable position of not knowing when a record transfer was mandated.

There remains another situation of confusion regarding mandated student record transfer that occurs in situations where an alleged crime involving a student entitled to special education is reported by someone other than

the school, such as by a victim. By the express terms of the IDEA, when crimes committed by students receiving special education come to the attention of law enforcement officials in ways other than through reports by school officials, the requirement to transfer education records has no application. (Mayes and Zirkel, 2000, p. 478).

Summary: The best analysis, at this time, indicates that when a school reports a crime, with the knowledge and intent of reporting a crime allegedly committed by a student eligible for IDEA programs and services, the school must transfer the student's special education and discipline records to appropriate authorities, but only when at least one of the required exceptions to confidentiality are present. The school must transfer the student's records to law enforcement officers when the parent provides informed written consent, when complying with a court order or subpoena (and when the school makes a reasonable attempt to notify the parent in advance of the court order), when disclosure is made to protect the health or safety of the student or others, and when disclosure is made pursuant to a state statute concerning the juvenile justice system prior to adjudication and confidentiality is assured. Records kept by a school's law enforcement unit, if any, are not subject to the same confidentiality restrictions as are a student's education records.
When a student is arrested or charged with a criminal offense, but the school **has not reported** a "crime committed by a child with a disability," the school is not required by the IDEA to transfer special education and discipline records to law enforcement. However, the same confidentiality of student records exceptions under FERPA discussed previously may apply, such as written parent consent, court order, or compliance with a state statute concerning disclosure to the juvenile justice system prior to adjudication. In appropriate circumstances (such as protection for health and safety of the student or others), the school may transfer student education records.

Other References:

When a Massachusetts student alleged that his procedural rights were violated because the school failed to transfer his records to police and the police failed to timely consider his records, a court disagreed. In *Commonwealth v. Nathaniel N.* (2001), the court noted that the IDEA provision requiring transfer of records when a crime is reported to police does not specify the time frame ("when") in which the records must be transferred. Thus, a subsequent issued court order regarding the records was satisfactory (p. 205; 888).

A hearing officer in Texas has ruled that schools may seek parent written consent, but if unavailable or uncooperative, the school must transfer student records in a "reasonable" time period, which was considered by him to be ten school days. The hearing officer ruled that in transferring the records to law enforcement authorities without parent consent, the school had to comply with FERPA record keeping duties; namely, keeping a record of disclosure, warning the receiving authorities against redisclosure, and notifying the parent of a "proposed" disclosure. (*Northside Independent School District*, 1998.)

A federal court in Florida ruled that a school was justified in requesting that a deputy sheriff come to school when a student's defiant, disrespectful, and disruptive behavior became more than the school could control. A failure to transfer the student's special education and disciplinary records were determined by the court to be a technical violation of the IDEA. However, because there was no evidence of actual harm to the student resulting from the failure to transfer the records, the court concluded the failure was inconsequential. The judge in the case did not cite a FERPA exception to the requirement of prior written parent consent, and for that reason this decision should be considered of limited authority for the argument that student records

should have been transferred in the absence of a clear FERPA confidentiality exception. *Joshua S. v. School Board* (2002).

A Missouri state hearing panel decision took a more defensible position than the Florida court in *Joshua S.* In *Cassville*, the parent complained that the school had failed to forward his son's special education records to juvenile authorities following the son's arrest for distribution of "pills" at school. The three person state due process panel concluded that FERPA prohibits schools from disclosing or releasing student records without parent consent or the presence of one of the statutory enumerated exceptions to the requirement of prior parent consent. Because the parent had not given consent, and because none of the exceptions were applicable to the situation, the panel concluded that the school acted properly by not transferring any of the student's education records. *Cassville R-IV School District* (2002).

Question #5: ***Is the requirement that school authorities must transfer relevant student records to juvenile justice authorities or police when reporting a crime for the purpose of those authorities making better informed decisions regarding the student in the juvenile justice system?***

APPARENTLY YES. There is no known authority source which explains the rationale for the required transfer of student records. Logic and reality would indicate that it is premised on a need for law enforcement and juvenile court authorities to be as well informed as possible when making life changing decisions involving children.

Discussion. Juvenile court authorities, and to a somewhat lesser degree, law enforcement officers, in general, are granted and frequently exercise a wide degree of discretionary latitude when dealing with juvenile offenders. The more accurate the information those authorities have, the better their decision making will be. Sometimes, those decisions will be deliberative over a period of time, such as a juvenile court determination of whether or not to suspend a student's jail sentence, and sometimes there is no time for conscious deliberation, such as when law enforcement officers must subdue a student reacting violently to medications or situational events.

References:

A trial court noted that the IDEA "recognizes that such records would be relevant for placement and dispositional purposes," and its decision was subsequently reviewed favorably by an appellate court. Both courts agreed that there were no particular statutory timelines in a school's requirement to transfer student records. *Commonwealth v. Nathaniel N.* (2001).

In South Dakota, a hearing officer, reviewing a school's duty to transfer records to juvenile court, noted that the information was necessary so the judge could make informed decisions involving the student. (*Winner School District,* 2001).

Question #6: ***Is the requirement that schools transfer education records when reporting a crime the same when the student is charged with a crime as an adult?***

APPARENTLY, NO. The IDEA mandate to ensure that education records are transmitted to the appropriate authorities to whom the school reports a crime is modified by the 34 C.F.R. requirement of compliance with FERPA (§ 300.529(b)(2). One of the FERPA exceptions to the general confidentiality requirement of obtaining prior written consent is lost to schools when they report a crime to law enforcement authorities, and the student is charged with a crime as an adult.

Discussion. While the IDEA is clear on its requirement that a school is not prohibited from reporting a crime committed by a student with disabilities, regardless of age, the relevancy of age is less clear on the mandate to ensure that the student's relevant education records are transmitted to the appropriate authorities to whom the crime was reported. Under FERPA, a school may transfer student records to the **juvenile justice system prior to adjudication** when state law allows such a transfer, and the authorities to whom the records are transferred assure confidentiality (34 C.F.R. § 99.38). Iowa has such a statute allowing record transfer, but only when a written agreement between the school and juvenile authorities has been made previously (§ 280.25 Iowa Code).

The problem which arises when the student is being charged with an adult crime is that the IDEA provided FERPA exception on the transfer of records applies only to the juvenile justice system, and only prior to adjudication. Thus, when a student is charged for a crime as an adult instead of a juvenile, this fact appears to eliminate the transferring of records as one of the exceptions from the general requirement of needed prior written parent consent for the release of education records. It must be remembered that there will likely be a considerable time lag between the reporting of a crime and the determination to try a student as an adult. Education records may be important in making such decisions.

However, there remain several other ways that a school may legally transfer the student's educational records. First, the school may obtain the written consent of the parent or student when the student is over the age of 18 years, and the state has transferred parent rights to students of majority age under the IDEA; second, the situation may be a circumstance of a bona fide health or safety emergency; and third, a court order or subpoena may be issued for the transfer of student records (the school must attempt to notify parents prior to compliance).

In the absence of one of these three exceptions to prior written parent consent, a school may violate the student record confidentiality requirements of FERPA by transferring student records to law enforcement authorities when the student is charged with a crime **as an adult** rather than being charged as a minor. A Texas hearing officer has ruled that the IDEA record release provision, being a more recent enactment than FERPA, must be read to create an exception to FERPA's requirement of prior written consent (*Northside Independent School District*, 1998). While that interpretation is viable, it is legally questionable, and until stated by a court with jurisdiction over your school district, it would be advisable to not automatically transfer records of a student charged as an adult for criminal activity, but to

seek one of the other FERPA alternatives for the release of records, including prior written consent. [*Mays and Zirkel* (2000), p. 473.]

Question #7: ***Do situations of police liaison, police resource officers, and school "law enforcement units" present a situation needing special attention?***

YES: The IDEA does not appear to envision the many complexities of "reporting a crime" and the required transmittal of student records that may arise when school and law enforcement officers cooperate closely with schools on a regular basis in maintaining a safe school environment. All arrangements of law enforcement officers working regularly in the school environment must be accompanied by an awareness of this situational complexity. Attempts at a preventative legal stance may be accomplished only through anticipation of potential circumstances. Planning and agreeing in advance to appropriate school and law enforcement actions when these complex circumstances arise will more likely result in legally defensible positions. Written agreements or policies will provide the clearest guidance when situations arise.

Discussion. All of the potential circumstances which law enforcement officials might encounter when working on a regular basis in a school environment were not likely considered by Congress in the enactment of the IDEA provision. The plain language of the IDEA statutes and regulations regarding schools reporting a crime seem to envision school authorities contacting law enforcement officials regarding the reporting of a crime and law enforcement officials responding in order to investigate the allegations. But, in some situations, a police resource officer may already be on the scene at school, may have been involved in the incident and may have arrested a student at school and then informed the school. Sometimes, a "law enforcement official" may be a school employee. Some large school districts in the country have their own "law enforcement unit."

Is the school's official responsibility to transfer student records diminished because the student was arrested and the school officials did not "report a crime?" Can school officials transfer student records if none of the other exceptions to the FERPA requirement of prior written consent are present? A hearing officer in Tennessee concluded, on the facts before her, that two school officials manipulated a situation which resulted in a school resource officer arresting a student so that school officials would not have to follow the IDEA procedures for disciplining students (*Cabot School District,* 1998). Should the police resource officer relationship to school students and staff be clarified? How?

Clearly, the authority, responsibility and duties of the police liaison and police resource officer, must be agreed to by both school officials and law enforcement officials and should be in writing. Just as a written agreement likely specifies who will be responsible for the costs of a police resource officer at school, it should also clarify the officer's duties, supervisory responsibilities while at school and reasonable expectations for all persons concerned, including administrators, teachers and students.

When the law enforcement official who receives the "report" of a crime from school officials is an employee of the school authorized to make arrests, the competing policy interests of the IDEA become really confusing. It is imperative that school and law enforcement officials discuss the foreseeable situations which may arise and document the appropriate procedures through contract or policy.

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